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No. 99-1923

In the Supreme Court of the United States

THE YOUGHIOGHENY AND OHIO COAL CO., PETITIONER

v.

EVELYN MILLIKEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, which had previously affirmed a decision of an administrative law judge (ALJ) denying a widow's claim to black lung benefits, erred when it affirmed a subsequent ALJ's award of benefits on modification of the original decision, pursuant to 33 U.S.C. 922 and 30 U.S.C 932(a).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Amax Coal Co. v. *Franklin*, 957 F.2d 355 (7th Cir. 1992)	8
Banks v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459 (1968)	7, 8
Consolidation Coal Co. v. *Worrell*, 27 F.3d 227 (6th Cir. 1994)	8, 12
Director, OWCP v. *Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987)	11
Director, OWCP v. *Kaiser Steel Corp.*, 860 F.2d 377 (10th Cir. 1988)	11
Director, OWCP v. *Peabody Coal Co.*, 837 F.2d 295 (7th Cir. 1988)	11
Eifler v. *OWCP*, 926 F.2d 663 (7th Cir. 1999)	7, 12
Jessee v. *Director, OWCP*, 5 F.3d 723 (4th Cir. 1993)	7, 8, 9, 10
Keating v. *Director, OWCP*, 71 F.3d 1118 (3d Cir. 1995)	8, 10
Lee v. *Consolidation Coal Co.*, 843 F.2d 159 (4th Cir. 1988)	11
Metropolitan Stevedore Co. v. *Rambo*, 515 U.S. 291 (1995)	9
O'Keeffe v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971)	5, 7-8, 9

Cases—Continued: Page

Old Ben Coal Co. v. *Scott*, 144 F.3d 1045 (7th Cir. 1998) 10
Saginaw Mining Co. v. *Mazzulli*, 818 F.2d 1278 (6th Cir. 1987) 11

Statutes and regulations:

Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 2, 7
30 U.S.C. 921(c)(5) 2
30 U.S.C. 932(a) 3, 7
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 6
33 U.S.C. 919(d) 7, 12
33 U.S.C. 922 (§ 22) 3, 5, 6, 7, 8, 9, 10
20 C.F.R.:
Section 410.490 2
Section 725.101(a)(11) 7
Section 725.310 ..... 3, 7
Section 725.310(c) 11
Section 727.203 2
Section 727.203(b) 2
Section 727.204 2
Section 727.204(a) 4
Section 727.204(b) 4
Section 752.350(b) 7

Miscellaneous:

Employment Standard Admin., U.S. Dep't of Labor, BLBA Transmittal No. 94-18, *Coal Mine (BLBA) Procedure Manual*, Pt. 2 (Sept. 1994) 11
62 Fed. Reg. 3353 (1997) 11
64 Fed. Reg. 55,032-55,033 (1999) 11
H.R. Rep. No. 1244, 73d Cong., 2d Sess. (1934) 8
3 Arthur Larson, *Larson's Workers' Compensation Law* (2000) 8
S. Rep. No. 588, 73d Cong., 2d Sess. (1934) 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 200 F.3d 942. The September 30, 1998, decision and order of the Benefits Review Board (Pet. App. 35a-46a), the July 16, 1997, supplemental decision and order of the administrative law judge (ALJ) on remand (Pet. App. 47a-57a), the June 21, 1995, decision and order of the Benefits Review Board remanding the case to the ALJ (Pet. App. 58a-66a), and the April 15, 1993, decision and order of the ALJ denying modification (Pet. App. 67a-80a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1999. A petition for rehearing was

denied on March 2, 2000. The petition for writ of certiorari was filed on May 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1975, respondent Evelyn Milliken filed a claim for survivor's benefits under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, based on the death of her husband, Harold Milliken, who had worked in coal mines for approximately forty years before he retired in 1973. Pet. App. 2a. Petitioner Youghiogheny and Ohio Coal Company contested Milliken's claim, and a hearing was held before an ALJ. *Id.* at 48a. Concluding that petitioner had successfully rebutted Milliken's presumption of entitlement to benefits under 20 C.F.R. 727.203, the ALJ denied benefits. Pet. App. 48a. Although Milliken had also argued that she was entitled to benefits based on the widow's presumption, set forth at 30 U.S.C. 921(c)(5) and 20 C.F.R. 727.204, under which a widow is presumed entitled to benefits if her husband died before March 1, 1978, and worked at least 25 years in coal mines before June 30, 1971, the ALJ did not address her entitlement under that provision. Pet. App. 48a.

Milliken appealed pro se, and the Benefits Review Board awarded her benefits. The Board concluded that the presumption in 20 C.F.R. 410.490, rather than the presumption in 20 C.F.R. 727.203(b), was applicable, and that petitioner had not successfully rebutted the applicable presumption. Pet. App. 48a. On appeal, however, the Sixth Circuit concluded that petitioner had rebutted the presumption contained in Section 410.490, and the court reinstated the ALJ's order denying benefits. *Id.* at 48a-49a. Milliken filed a motion for leave to file out of time a petition for rehearing, in

which she planned to reassert her contention that the widow's presumption was applicable, but the Sixth Circuit denied the motion. *Id.* at 6a-7a.

2. By letter dated February 5, 1990, Milliken initiated a modification proceeding. See 33 U.S.C. 922; 30 U.S.C. 932(a); 20 C.F.R. 725.310. A hearing was convened before a second ALJ. Pet. App. 7a-8a. Milliken argued that the first ALJ had erred in failing to award her benefits under the widow's presumption. *Id.* at 72a. Both Milliken and a former coworker of her husband testified about their observations of her husband's respiratory symptoms and physical limitations before his death. *Id.* at 73a-74a. In addition, Milliken submitted the written opinion of Dr. D. L. Rasmussen, who concluded, based on his review of the record, that Milliken's husband had pneumoconiosis and a disabling respiratory impairment, but that it was impossible conclusively to connect the two. *Id.* at 74a.

The ALJ issued an order denying benefits. The ALJ first concluded that the request for modification was timely and that the prior decision of the Sixth Circuit reversing the Board's grant of benefits did not preclude modification. Pet. App. 77a-78a. The ALJ nevertheless denied modification because he concluded that modification is available only to correct mistakes in fact and that Milliken was asserting a mistake in law. *Id.* at 78a-79a.

3. The Board reversed the ALJ's decision and remanded. The Board first rejected petitioner's argument that the petition for modification was untimely. Pet. App. 61a-62a. The Board also rejected petitioner's contention that the ALJ was not empowered to grant modification because the Sixth Circuit had issued a decision reinstating the first ALJ's denial of benefits. *Id.* at 62a-64a. The Board then addressed the ALJ's

conclusion that modification was unavailable to Milliken because the mistake she asserted—failure to apply the widow's presumption—was a mistake of law and not of fact. The Board noted that both the Fourth and Sixth Circuits have held that, on motion for modification, the agency must consider all the evidence bearing on the ultimate fact of claimant's entitlement to benefits. *Id.* at 64a. On the basis of those decisions, as well as Board and Seventh Circuit precedent that modification is available to correct mistakes involving mixed questions of law and fact, the Board remanded the case to the ALJ to consider Milliken's entitlement under the widow's presumption. *Id.* at 65a-66a.

4. On remand, the ALJ concluded that Milliken was entitled to benefits under the widow's presumption. The ALJ found that Milliken was entitled to the presumption because her husband died before March 1, 1978, and was employed for at least 25 years as a coal miner before June 30, 1971. Pet. App. 50a-51a. Moreover, relying on the lay testimony at the second hearing, as well as Dr. Rasmussen's report, the ALJ found that petitioner had not established that Milliken's husband was not totally or partially disabled by pneumoconiosis at the time of his death, and therefore had not rebutted the presumption. *Id.* at 51a-56a; see 20 C.F.R. 727.204(a) and (b). On appeal, the Board affirmed the ALJ's award of benefits. *Id.* at 35a-46a.

5. Petitioner sought review of the Board's decision, and the court of appeals denied its petition. Pet. App. 2a. The court concluded that "the Board affirmance was not legally erroneous and that the ALJ's decision was supported by substantial evidence." *Ibid.*

The court first rejected petitioner's contention that, because Milliken had raised the applicability of the widow's presumption before the Sixth Circuit in her

untimely petition for rehearing of the court's previous decision, she was foreclosed by the court's prior mandate from raising the issue in her request for modification. Pet. App. 9a-12a. The court reasoned that the merits of Milliken's petition for rehearing were never decided by the court "either expressly or impliedly" because she did not timely file a rehearing petition, and the court denied her motion for permission to file one out of time. *Id.* at 12a. The court also rejected various other procedural objections raised by petitioner—including that the request for modification was not timely filed, that the letter of February 5, 1990, was not adequately specific to invoke the modification process, and that Milliken had irretrievably forfeited the argument that she was entitled to the widow's presumption because she had not reiterated the argument in her pro se appeal of the ALJ's initial decision denying benefits. *Id.* at 12a-20a.

On the merits, the court of appeals, relying on *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971) (per curiam), held that 33 U.S.C. 922 empowered the ALJ to reweigh the evidence on request for modification, "regardless of whether the issue of disability due to pneumoconiosis is labeled one of 'law,' 'fact,' or 'ultimate fact.'" Pet. App. 22a. The court was not persuaded by petitioner's contention that such a rule would open the floodgates of litigation. The court viewed that prospect as unlikely because agency adjudicators have discretion to refuse requests for modification. *Id.* at 22a-23a. The court further noted that, "[o]nce a year has passed, the time for modification has run and res judicata will bar subsequent challenges to the correctness of the adjudication." *Id.* at 23a. In any event, the court explained, it did not

have authority to "amend the statute or disregard the way the Supreme Court has interpreted it." *Id.* at 22a.

Judge Wellford dissented based in part on his view that, in denying Milliken's petition for rehearing in 1989, the court of appeals had "considered and rejected the arguments advanced," including Milliken's entitlement under the widow's presumption. Pet. App. 27a-28a. In addition, Judge Wellford concluded that Milliken's letter of February 5, 1990, was not adequately specific to constitute a modification request. *Id.* at 29a-31a. Moreover, Judge Wellford viewed Dr. Rasmussen's report as cumulative of the prior evidence, and therefore he "would not disturb the earlier fact findings and conclusions of the ALJ in 1986 and this court's judgment." *Id.* at 33a-34a.

ARGUMENT

The court of appeals correctly held that the ALJ could modify the prior ALJ's decision to deny benefits.[1] That holding does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. 901 *et seq.*, provides:

> Upon his own initiative, or upon the application of any party in interest * * *, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of

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[1] The petition does not raise, and we do not address, the questions whether Milliken's modification request was timely or adequately specific. See Pet. i.

> compensation, * * * or at any time prior to one year after the rejection of a claim, review a compensation case * * * [and] issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.

33 U.S.C. 922. That provision is incorporated into the Black Lung Benefits Act (BLBA), 30 U.S.C. 901 *et seq.*, by 30 U.S.C. 932(a) and is reiterated in a regulation that the Secretary of Labor has promulgated under the BLBA. 20 C.F.R. 725.310.

The deputy commissioner, now called the district director, 20 C.F.R. 725.101(a)(11), is the Department of Labor's initial adjudication officer for black lung claims, see 20 C.F.R. 725.350(b). The 1972 amendments to the Longshore Act, however, removed the authority of district directors to conduct hearings and transferred that authority to ALJs. See 33 U.S.C. 919(d). All powers vested in the deputy commissioners with respect to such hearings were transferred to the ALJs. *Ibid.*; see *Eifler* v. *OWCP*, 926 F.2d 663, 665-666 (7th Cir. 1991).

Thus, Section 22, as implemented by the Secretary of Labor, alters the ordinary principles of res judicata by providing that "[u]nsuccessful black lung claimants may, within a year of the final order, request modification of the order." *Jessee* v. *Director, OWCP*, 5 F.3d 723, 724 (4th Cir. 1993); see also *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 462-465 (1968). Moreover, as this Court has held, Section 22 vests the factfinder with "broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe* v. *Aerojet-*

General Shipyards, Inc., 404 U.S. 254, 256 (1971) (per curiam).

Consistent with Congress's intent that modification be available whenever "desirable in order to render justice under the act," *Banks*, 390 U.S. at 464 (quoting S. Rep. No. 588, 73d Cong., 2d Sess. 3-4 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess. 4 (1934)), courts uniformly have concluded that any factual mistake may be corrected, including the ultimate issue of entitlement to benefits. See, *e.g.*, *O'Keeffe*, 404 U.S. at 255; *Banks*, 390 U.S. at 464-465; *Keating* v. *Director, OWCP*, 71 F.3d 1118, 1123 (3d Cir. 1995); *Consolidation Coal Co.* v. *Worrell*, 27 F.3d 227, 230 (6th Cir. 1994); *Jessee*, 5 F.3d at 725; *Amax Coal Co.* v. *Franklin*, 957 F.2d 355, 358 (7th Cir. 1992). It is thus well established that the Longshore and Black Lung Acts have "perhaps the most permissive 'mistake' reopening rule on record." 3 Arthur Larson, *Larson's Workers' Compensation Law* § 131.05(2)(b), at 131-158 (2000). The court of appeals here correctly applied that settled rule to the facts of this case.

2. Petitioner contends (Pet. 8-14) that the court of appeals misread *O'Keeffe* in affirming the ALJ's grant of benefits on modification when the original decision rejecting the claim had been reviewed by the court of appeals. Petitioner reasons that, because the denial of benefits that was modified in *O'Keeffe* had not been reviewed by another tribunal, only denials of benefits that have not been reviewed may be modified under Section 22, at least "[a]bsent some change of circumstances that renders the new claim somehow different." Pet. 12.

Nothing in *O'Keeffe*, however, suggests that modification of a decision under Section 22 is barred when the decision has been reviewed by another tribunal. And,

contrary to petitioner's suggestion that the availability of modification turns on a "change of circumstance[s] that renders the new claim somehow different" (Pet. 12), the Court in *O'Keeffe* expressly rejected the contention that Section 22 modifications are limited to "cases involving new evidence or changed circumstances." 404 U.S. at 255; accord *Metropolitan Stevedore Co.* v. *Rambo*, 515 U.S. 291, 295-296 (1995).

Petitioner nonetheless contends (Pet. 12) that, unless *O'Keeffe* is limited to its facts, modification will run afoul of "longstanding principles of claim preclusion" and "policies against piecemeal adjudication." As a result of Section 22, however, "the 'principle of finality' just does not apply to Longshore Act and black lung claims as it does in ordinary lawsuits." *Jessee*, 5 F.3d at 725 (citing *Banks*, 390 U.S. at 461-465). That is not to say that Section 22 eliminates finality for such claims, but, as this Court recognized in *O'Keeffe*, Section 22 "set[s] a different time limit for a redetermination of fact." See 404 U.S. at 256.

Petitioner also misses the mark in asserting (Pet. 12) that the court of appeals' reading of *O'Keeffe* disregards "the authority of a superior adjudicative body's decision over an inferior adjudicative body." As the court of appeals explained, in its initial decision in this case, the court did not review or rule on the merits of Milliken's contention that she was entitled to have her claim considered under the widow's presumption. Pet. App. 12a. That decision therefore did not create any mandate on the issue with which the modification award could conflict. *Id.* at 11a-12a. Although the dissent disagreed with that conclusion as a factual matter (*id.* at 27a-28a), petitioner does not raise that fact-based argument in this Court.

More fundamentally, petitioner's contention that only benefit denials that have not been reviewed may be modified finds no support in the language of Section 22, which does not merely provide for modification of the claim within one year of a deputy commissioner's unreviewed denial of a claim, but instead broadly provides for modification "at any time prior to one year after the rejection of a claim." 33 U.S.C. 922. Thus, a number of courts properly have upheld modification awards where the original denial of benefits was reviewed by the Board without questioning the propriety of modification in that situation. See, *e.g.*, *Old Ben Coal Co.* v. *Scott*, 144 F.3d 1045, 1046 (7th Cir. 1998); *Keating*, 71 F.3d at 1121; *Jessee*, 5 F.3d at 724.

Petitioner's concern (Pet. 13-14) about the potential for abuse by never-say-die litigants is both overstated and misdirected. The decision of the court of appeals does no more than permit a claimant whose valid argument before the initial ALJ was overlooked to obtain reconsideration of that argument within one year of the rejection of her claim. As the court of appeals noted (Pet. App. 22a- 23a), the agency adjudicator has discretion to refuse modification; and, after one year from the final order rejecting a claim or from the last payment of benefits, modification under Section 22 is no longer available. Although petitioner may disagree with the suspension of finality until that time, Congress provided for it in Section 22. It is thus Section 22, not the decision of the court of appeals, that gives claimants more than one "bite at the apple." Pet. 13.

3. Petitioner also errs in contending (Pet. 14-15) that the decision of the court of appeals in this case conflicts with decisions of other courts of appeals. In each of the cases that petitioner cites, a district director attempted

to modify the award of an ALJ by correcting an alleged factual mistake made by the ALJ. *Director, OWCP* v. *Kaiser Steel Corp.*, 860 F.2d 377 (10th Cir. 1988); *Director, OWCP* v. *Peabody Coal Co.*, 837 F.2d 295 (7th Cir. 1988); *Director, OWCP* v. *Drummond Coal Co.*, 831 F.2d 240 (11th Cir. 1987).[2] As the court of appeals explained, those cases at most stand for "the unremarkable proposition that inferior tribunals cannot refuse to obey the decisions of superior tribunals." Pet. App. 10a.

In contrast, in this case, an ALJ modified a prior ALJ decision after that decision had been reviewed by the court of appeals but without any ruling by the court of appeals on the issue that formed the basis for the modification. As the court of appeals explained (Pet.

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[2] The Fourth and the Sixth Circuits have held that a district director has the authority to initiate and propose modification of an ALJ's mistake of fact. See *Lee* v. *Consolidation Coal Co.*, 843 F.2d 159 (4th Cir. 1988); *Saginaw Mining Co.* v. *Mazzulli*, 818 F.2d 1278 (6th Cir. 1987). As discussed in the text, this case involves an ALJ's modification of another ALJ's decision; it therefore does not present an occasion to resolve any tension that may exist between the views of the Seventh, Tenth, and Eleventh Circuits on the one hand and the Fourth and Sixth Circuits on the other regarding a district director's authority to modify an ALJ's decision. In any event, the Secretary now refers all cases arising under the BLBA in which the district director has initiated modification proceedings based on an ALJ's mistake of fact to the Office of Administrative Law Judges for a hearing. See Employment Standards Admin., U.S. Dep't of Labor, BLBA Transmittal No. 94-18, *Coal Mine (BLBA) Procedure Manual*, Pt. 2, ch. 2-1302, ¶ 7.c (Sept. 1994). Thus, district directors no longer attempt to modify mistaken ALJ decisions in BLBA cases. In such cases, district directors simply initiate modification proceedings and leave for the ALJ the issue whether to modify the allegedly mistaken decision. The Secretary has proposed to codify this policy in a rule. See 64 Fed. Reg. 55,032-55,033 (1999) (proposed 20 C.F.R. 725.310(c)); 62 Fed. Reg. 3353 (1997) (preamble).

App. 12a), this case thus does not present the question whether an inferior tribunal (here the ALJ) may disregard a determination made by a superior tribunal (here the court of appeals).

Moreover, the analogy that petitioner would draw between a district director's modification of an ALJ's factual determination and an ALJ's modification of another ALJ's factual determination as affirmed by a court of appeals is flawed. The relationship between the district director and the ALJ is not comparable to the one between the ALJ and the court of appeals. Under the administrative scheme, the ALJ is an independent factfinder who has authority to find facts after a hearing. See 33 U.S.C. 919(d). In contrast, the court of appeals, like the Board, cannot find facts; it may only review whether substantial evidence supports the ALJ's factual determinations and whether the ALJ has made errors of law. *Worrell*, 27 F.3d at 230-231. Thus, whether or not a district director can reconsider a fact found by an ALJ after a hearing, it is clear that an ALJ can reconsider a fact found by another ALJ. See *Eifler*, 926 F.2d at 666. That conclusion holds true even if the ALJ's decision has been reviewed for substantial evidence and errors of law by the Board and the court of appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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